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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 FRANCISCO SOTO,

12 Plaintiff,

13 v.

14 R. GINES, et al.,

15 Defendants.  
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Case No. 11-CV-235-LAB (JMA)

**REPORT AND  
RECOMMENDATION DENYING  
DEFENDANTS' MOTION FOR  
LEAVE TO FILE AN AMENDED  
ANSWER TO FIRST AMENDED  
COMPLAINT [Doc. No. 49]**

17 Presently before the Court is an ex parte application, construed by  
18 the Court as a motion, for leave to file an amended answer to First  
19 Amended Complaint filed by Defendants Gines and Hunt ("Defendants").  
20 (Doc. No. 49.) For the reasons set forth below, the Court recommends that  
21 Defendants' motion be **DENIED**.

22 **I. Background**

23 Plaintiff Francisco Soto ("Plaintiff"), a state prisoner currently  
24 incarcerated at California State Prison, Los Angeles County, in Lancaster,  
25 California, proceeding *pro se* and *in forma pauperis*, initiated this action by  
26 filing a civil rights complaint pursuant to 42 U.S.C. § 1983 on February 3,  
27 2011. (Doc. No. 1.) Plaintiff alleged that he was injured on February 11,  
28 2010 when a food cart fell on him as he was performing his assigned work

1 duties while incarcerated at the Richard J. Donovan Correctional Facility.  
2 Compl. at 3. He alleged the accident caused a visible fracture to the orbital  
3 bone on the left side of his face as well as two additional fractures, and that  
4 Defendants Gines, Hunt, White, and Stout failed to provide him with  
5 adequate medical care, violated his right to be free from cruel and unusual  
6 punishment, and violated his right to due process. Id. at 3-5. On October  
7 7, 2011, after the defendants filed a motion to dismiss the complaint  
8 pursuant to Fed. R. Civ. P. 12(b) and 12(b)(6), Plaintiff filed a First  
9 Amended Complaint ("FAC"). The FAC alleged only one claim for violation  
10 of the Eighth Amendment right to freedom from cruel and unusual  
11 punishment against Defendants Gines, Hunt, and White. (Doc. No. 23.)  
12 On October 12, 2011, the defendants requested that their motion to  
13 dismiss apply to the FAC. (Doc. No. 25.)

14 On January 30, 2012, this Court filed a Report and Recommendation  
15 ("R&R") regarding Defendants' motion to dismiss. (Doc. No. 33.) The  
16 Honorable Larry Alan Burns, United States District Judge assigned to this  
17 case, adopted the R&R on February 27, 2012. (Doc. No. 34.) The effect of  
18 the R&R and Judge Burns' order was that Plaintiff's Eighth Amendment  
19 claim was permitted to proceed against Defendants Gines and Hunt.<sup>1</sup>  
20 These defendants filed an Answer on March 30, 2012. (Doc. No. 35.)

21 The undersigned held a Case Management Conference on May 11,  
22 2012 and, after an unsuccessful attempt to appoint pro bono counsel for  
23 Plaintiff, issued a Scheduling Order on June 7, 2012. (Doc. No. 40.) The  
24 Scheduling Order provided that, "Any motion to join other parties, to amend  
25 the pleadings, or to file additional pleadings shall be filed on or before July  
26 9, 2012." Scheduling Order, ¶ 1.

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28 <sup>1</sup>Plaintiff's claim against Defendant White was dismissed without prejudice  
on May 14, 2012 due to Plaintiff's failure to serve him in a timely manner. (Doc.  
No. 39.)

1 On November 2, 2012, Defendants filed an Amended Answer. (Doc.  
2 No. 46.) On November 7, 2012, the undersigned convened a Case  
3 Management Conference, at which time counsel for Defendants advised  
4 that she had filed an amended answer on behalf of Defendants to assert an  
5 affirmative defense that Plaintiff's exclusive remedy was a worker's  
6 compensation claim since he was injured while working at the prison. That  
7 same day, the Amended Answer was stricken from the record because  
8 Defendants had not complied with Fed. R. Civ. P. 15(a)(2), which requires  
9 an opposing party's written consent or leave of court to file an amended  
10 pleading. (Doc. No. 48.)

11 On November 29, 2012, Defendants filed the instant motion for leave  
12 to file an amended answer. (Doc. No. 49.) The Court issued a briefing  
13 schedule on December 3, 2012. (Doc. No. 50.) Plaintiff did not file an  
14 opposition to the motion.

## 16 **II. Legal Standards**

17 Defendants move to amend their answer pursuant to Federal Rule of  
18 Civil Procedure Rule 15. Rule 15 provides that "[t]he court should freely  
19 give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2);  
20 see also Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000)  
21 ("Generally, [Rule 15(a)] liberally allows for amendments to pleadings.").  
22 However, once a district court has issued a scheduling order, it is the  
23 standards of Rule 16 that govern, not Rule 15. See Johnson v. Mammoth  
24 Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992); Coleman, 232 F.3d  
25 at 1294.

26 Under Rule 16(b) of the Federal Rules of Civil Procedure, a district  
27 court must issue a scheduling order "as soon as practicable." Fed. R. Civ.  
28 P. 16(b)(2). "The scheduling order must limit the time to join other parties,

1 amend the pleadings, complete discovery, and file motions,” and “may be  
2 modified only for good cause and with the judge’s consent.” Fed. R. Civ. P.  
3 16(b)(3)(A) & (b)(4). Parties seeking to amend their pleadings after the  
4 deadline set forth in a scheduling order has passed “must show good  
5 cause for not having amended their [pleadings] before the time specified in  
6 the scheduling order expired.” Coleman, 232 F.3d at 1294 (citing Johnson,  
7 975 F.2d at 608-09). “This standard ‘primarily considers the diligence of  
8 the party seeking the amendment.’” Id. (quoting Johnson, 975 F.2d at  
9 609.) If good cause is shown, the requested amendment is then analyzed  
10 under Rule 15. Johnson, 975 F.2d at 608-09. If, however, the moving  
11 party does not demonstrate diligence, the inquiry should end. Id. at 609.

### 12 13 **III. Discussion**

14 Defendants’ requested amendment is subject to the standard set  
15 forth in Rule 16 because the request to amend their answer was not made  
16 until November 29, 2012, over four months after the July 9, 2012 deadline  
17 to move to amend the pleadings. Unfortunately, Defendants’ motion does  
18 not recognize this, and provides no argument concerning modification of  
19 the scheduling order. Indeed, Defendants make no reference to the July 9,  
20 2012 deadline to move to amend the pleadings, nor why they did not file  
21 their motion within the time prescribed. Instead, the substance of  
22 Defendants’ motion relates only to Rule 15, which is not applicable here  
23 until the standards of Rule 16 have been met. The Court is left to  
24 speculate why Defendants could not have moved earlier to assert an  
25 affirmative defense of worker’s compensation exclusivity when they have  
26 known the facts upon which the affirmative defense is based, i.e., that  
27 Plaintiff was allegedly injured while performing his assigned work duties in  
28 prison, since the time the original complaint was filed on February 3, 2011.

1 Without any explanation offered by Defendants, the Court cannot fathom  
2 why they waited until November 29, 2012 to seek to amend their answer.  
3 The Court thus cannot make a finding that Defendants have acted with  
4 diligence in seeking to amend their answer.

5 In the Ninth Circuit, “where a motion to amend [a pleading] is filed,  
6 the motion to amend . . . is also deemed to be a motion to amend the  
7 scheduling order, and the court’s denial of that motion to amend . . . is  
8 deemed to be a denial of the motion to amend the scheduling order.”  
9 Aldan v. World Corp., 267 F.R.D. 346, 355-56 (D. N. Mar. I. 2010) (citing  
10 Johnson, 975 F.2d at 609-09). Under Rule 16(b), Defendants must show  
11 good cause for not having amended their answer before the deadline set  
12 forth in the scheduling order. They have failed to do so.

13 Accordingly, the Court declines to amend the scheduling order, and  
14 recommends that Defendants’ motion to file an amended answer be  
15 **DENIED**.


#### 16 17 **IV. Conclusion and Recommendation**

18 For the reasons set forth above, Defendants’ motion for leave to file  
19 an amended answer to the First Amended Complaint should be **DENIED**.

20 This report and recommendation will be submitted to the Honorable  
21 Larry Alan Burns, United States District Judge assigned to this case,  
22 pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file  
23 written objections with the Court and serve a copy on all parties on or  
24 before **March 28, 2013**. The document should be captioned “Objections to  
25 Report and Recommendation.” Any reply to the Objections shall be served  
26 and filed on or before **April 11, 2013**. The parties are advised that failure  
27 to file objections within the specified time may waive the right to appeal the  
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1 district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

2 DATED: March 13, 2013

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4 Jan M. Adler  
U.S. Magistrate Judge